Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

JIM HENRY PERKINS AND JESSIE FRANK QUALLS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF VETERANS AFFAIRS, AND ROBERT T. HOWARD, IN HIS OFFICIAL CAPACITIES AS ASSISTANT SECRETARY FOR INFORMATION AND TECHNOLOGY AND CHIEF INFORMATION OFFICER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Question Presented for Review

The Privacy Act grants citizens the right to recover from the Government "actual damages sustained by the individual as a result of [an agency's intentional or willful] refusal or failure [to comply with the requirements of the statute], but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A). In *Doe v. Chao*, 540 U.S. 614 (2004), this Court held that "[t]he statute guarantees $1,000 only to plaintiffs who have suffered some actual damages." *Id.* at 627. This Court further noted in *Doe* that "[t]he Courts of Appeals are divided on the precise definition of actual damages," with some Courts of Appeals restricting actual damages to pecuniary losses only and some allowing recovery for mental injury and emotional distress. *Id.* at 627 n.12. Here, the Court of Appeals affirmed the dismissal of Petitioners' Privacy Act claims based solely on the fact that Petitioners suffered mental injury and related physical symptoms, but not pecuniary losses. App., *infra*, 11a.

Thus, the question presented is the question left unanswered by *Doe*: Whether "actual damages" under the Privacy Act, 5 U.S.C. § 552a, are restricted to pecuniary losses only.

List of Parties

Petitioners are Jim Henry Perkins and Jessie Frank Qualls, two Vietnam combat veterans ("the Veterans"). Plaintiff Greg Fanin was dismissed without prejudice at the District Court and is not a Petitioner here.

Respondents are the United States Department of Veterans Affairs, its Secretary Eric Shinseki, and its Assistant Secretary for Information and Technology and Chief Information Officer Robert T. Howard (the later two in their official capacities only) (collectively "the VA").

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Jim Henry Perkins and Jessie Frank Qualls respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Opinions Below

The opinion of the Court of Appeals (App., *infra*, 1a-18a) is reported at 572 F.3d 868 (11th Cir. 2009). The decision of the District Court granting the VA's motion for summary judgment (App., *infra*, 19a-35a) is unreported.

Statement of Jurisdiction

The final judgment of the Court of Appeals was entered on June 17, 2009. App., *infra*, 1a. The Court of Appeals denied a timely petition for rehearing en banc on August 5, 2009. App., *infra*, 36a-37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The Privacy Act contains a private right of action that entitles an individual to recover from the Government "actual damages sustained by the individual as a result of [an agency's intentional or willful] refusal or failure [to comply with the requirement of the statute], but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A). The relevant portions of the Privacy Act, 5 U.S.C. § 552a, are reproduced at App., *infra*, 38a-39a.

Statement of the Case

The United States District Court for the Northern District of Alabama granted summary judgment on the Privacy Act claims brought by the Veterans against the VA following a data breach at the VA's facilities in Birmingham, Alabama. The sole basis for dismissal was the District Court's conclusion that the Veterans had not established "actual damages" because they "have not alleged (or proven) that they have suffered any pecuniary losses as a result of the missing external hard drive," even though they had "alleged and proven that they have suffered mental injuries such as aggravation of their PTSD symptoms."[1] App., *infra*, 29a. The Court of Appeals affirmed the judgment dismissing the Veterans' Privacy Act claims based solely on its prior decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982), which held that "'actual damages' under the Privacy Act means only pecuniary losses." App., *infra*, 9a, 11a.

A. The Privacy Act

Congress enacted the Privacy Act in 1974 in recognition that "'in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies.'" *Doe v.*

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[1] Post-Traumatic Stress Disorder or "PTSD" is a well-recognized anxiety disorder that occurs after an individual experiences a traumatic event such as combat. *See generally* U.S. Dep't of Veterans Affairs, National Center for PTSD, Fact Sheet, What is PTSD?, http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp (last visited Oct. 16, 2009).

Chao, 540 U.S. 614, 618 (2004) (quoting the Privacy Act of 1974, Pub. L. No. 93–579, § 2(a)(5), 88 Stat. 1896 (1974)). To accomplish this goal, the statute "gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements." *Id.*

The Privacy Act contains four private rights of action against a federal agency for violations of the statute. *See* 5 U.S.C. § 552a(g)(1)(A)-(D). The provision that applies here is subsection (g)(1)(D). That provision states:

> Whenever an agency—(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(1)(D). The statute further sets out the relief that is available under this provision if the agency acted in an "intentional or willful" manner:

> [T]he United States shall be liable to the individual in an amount equal to the sum of—(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the

costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

Among the "other" violations of the Privacy Act that can be redressed through section 552a(g)(1)(D) is an agency's failure to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity *which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained*." 5 U.S.C. § 552a(e)(10) (emphasis added).

B. The VA's Privacy Act Violations in Birmingham, Alabama

The salient facts are largely undisputed.[2] In 2006, the Birmingham VA Medical Center purchased fifteen external hard drives. App., *infra*, 3a. The VA purchased the hard drives knowing they did not

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[2] The bulk of the facts discussed here and in the Court of Appeals' opinion are documented in an investigation report issued by the VA Office of Inspector General. *See* U.S. Dep't of Veterans Affairs, Administrative Investigation, Loss of VA Information, VA Medical Center, Birmingham, AL, Report No. 07-01083-157 (June 29, 2007) ("VAOIG Report"). The VAOIG Report was part of the record (C.A. R. 33-3), and an electronic copy is available at http://www.va.gov/oig/51/FY2007rpts/VAOIG-07-01083-157.pdf. The District Court stayed proceedings to allow the VA Office of Inspector General to conduct its investigation and submit its report. At no point in this litigation has the United States disputed or called into question any of the facts reported in the VAOIG Report.

include required encryption technology and without following procurement rules designed to protect privacy. VAOIG Report iv, 15-17, 20. Encryption software was available, but VA officials testified that they did not want to pay for it. C.A. R. 16, Ex.14 at 3-4.[3]

One of the hard drives was assigned to a VA information technology specialist working in Birmingham (pseudonym "John Doe"). App., *infra*, 20a. In violation of the Privacy Act and other federal laws, John Doe used the hard drive to store personal information of more than 198,000 living veterans—including their unencrypted names, social security numbers, birth dates, and healthcare files. App., *infra*, 2a, 4a. Among them are Petitioners Jim Henry Perkins and Jessie Frank Qualls. App., *infra*, 3a. The hard drive contained a "treasure trove of private data"—"a pocket-sized gold mine for identity thieves." App., *infra*, 2a.

The VA failed to adequately supervise John Doe's activities. App., *infra*, 4a; VAOIG Report 40-41. It granted him access to VA databases beyond the requirements of his job and the scope of his background check, from which he downloaded veterans' personal information to the hard drive. App., *infra*, 4a; VAOIG Report v, 22-24, 40. He was given "carte blanche" access to multiple VA databases,

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[3] The briefing rules of the Eleventh Circuit require the filing of Record Excerpts in lieu of an Appendix. 11th Cir. R. 30-1. Thus, this petition uses the convention "C.A. R. #" to refer to portions of the record before the Court of Appeals that are not included in the Appendix to this petition. These numbers also correspond to the numbered entries in the District Court docket.

including a nationwide database of social security numbers. VAOIG Report 22-24, 30-32. He kept the unencrypted hard drive with this information in a VA facility with an inadequate security plan, and VA officials knew as early as December 2006 that the front door to the office used by John Doe and other VA employees was left unlocked at night in a known high crime area. VAOIG Report iv-v, 17-18.

On January 22, 2007, John Doe reported the hard drive missing. App., *infra*, 3a; VAOIG Report 1; C.A. R. 46 at 2. He successfully deleted files from his computer to hide the extent of his activities. VAOIG Report 8-9. The VA's Office of Inspector General and the Federal Bureau of Investigation conducted investigations. The hard drive was not recovered. VAOIG Report i; C.A. R. 46 at 3.

C. The Veterans' Injuries

Mr. Perkins and Mr. Qualls are Vietnam combat veterans with chronic severe Post-Traumatic Stress Disorder ("PTSD"). App., *infra*, 3a. Both receive medical treatment from VA hospitals in Alabama. App., *infra*, 3a, 21a. To treat their PTSD, both participate in group therapy sessions at the VA and see a VA doctor several times a year who prescribes medications for their PTSD and other conditions. App., *infra*, 3a.

Upon learning of the VA's data breach from press reports, the Veterans became worried that their own personal and medical information had been compromised. C.A. R. 33-3 at ii; C.A. R. 40, Ex. 1 at ¶ 7, Ex. 2 at ¶ 7. Mr. Perkins called the public "hotline" established by the VA, but the VA would not

tell him whether or not his information had been compromised. C.A. R. 40, Ex. 1 at ¶ 8. He was told he would be notified in writing. *Id.*; App., *infra*, 3a. It was not until March 13, 2007—nearly two months after the VA knew of its security breaches—that the Veterans were finally told by the VA that their personal data had been compromised. C.A. R. 40, Ex. 1 at ¶ 9, Ex. 2 at ¶ 8. The VA's letter recommended that the Veterans take several actions on their own to protect themselves. C.A. R.33-5, Attach. B. First, the VA told them to obtain and review their credit report. *Id.* The Veterans did this. C.A. R. 40, Ex. 1 at ¶ 10, Ex. 2 at ¶ 9. Second, VA told them to contact the Federal Trade Commission ("FTC") and put a "fraud alert" on their credit accounts. C.A. R. 33-5, Attach. B. The Veterans contacted the FTC number the VA provided, but were confused by what they were told. C.A. R. 40, Ex. 1 at ¶ 11, Ex. 2 at ¶ 10. Third, the VA told the Veterans that they would receive "a follow-up letter" "[i]f VA determines that your information or you are at risk as a result of this incident." C.A. R. 33-5, Attach. B. It was not until April 30, 2007, that the VA finally sent its "follow-up letter" offering credit monitoring for one year. C.A. R. 33-5, Attach. C.

Faced with confusing and incomplete information from the VA, the Veterans took steps to protect themselves. C.A. R. 40, Ex. 1 at ¶¶ 12, 13, Ex. 2 at ¶¶ 9, 10, 11. Even with the VA's offer of one-year credit monitoring, they had to actively monitor their own credit and financial accounts, which they found frustrating and difficult.[4] *Id.*

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[4] The VA advised affected veterans that "[b]ecause SSNs were on this portable hard drive, we advise individuals to monitor

The Veterans' PTSD and its physical symptoms were aggravated by the stress of dealing with the VA's loss of their personal information and the resulting risk of identity theft.[5] App., *infra*, 4a.; C.A. R. 40, Ex. 1 at ¶ 13, Ex. 2 at ¶ 11. The Veterans suffered worsening of their PTSD physical symptoms, including increased sleeplessness, isolation, anxiety, and anger. App., *infra*, 4a.; C.A. R. 40, Ex. 1 at ¶ 13, Ex. 2 at ¶ 11. To address these worsening symptoms, Mr. Perkins needed new medication from his doctor, and Mr. Qualls had his dosage increased. App., *infra*, 4a.; C.A. R. 40, Ex. 1 at ¶ 13, Ex. 2 at ¶ 11.

D. District Court Proceedings

This case was filed on February 15, 2007. Mr. Perkins joined as a plaintiff when the first amended complaint was filed March 14, 2007 (C.A. R. 5), and Mr. Qualls joined when the second amended complaint was filed April 25, 2007 (C.A. R. 21). The Veterans' second amended complaint contains claims for both monetary damages under the Privacy Act and injunctive relief under the Administrative Procedures Act ("APA"). After the case was stayed for several months so the VA could investigate the matter and file

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financial accounts continuously for suspicious activity as a matter of good practice." C.A. R. 33-5, Attach. D at 4.

[5] According to peer-reviewed literature from VA researchers, individuals with PTSD react differently and more strongly to stressors than do individuals without PTSD. Todd C. Buckley et al., *Preventive Health Behaviors, Health-Risks Behaviors, Physical Morbidity, and Health-Related Role Functioning Impairment in Veterans with Post-Traumatic Stress Disorder*, 169 Military Medicine 7:536 (2004).

its report, the VA filed a motion to dismiss or in the alternative for summary judgment, and the District Court granted summary judgment on all claims on January 8, 2008. No discovery was conducted or allowed. C.A. R. 23, 35.

The District Court granted summary judgment on the Veterans' Privacy Act claims because it concluded that the Veterans "cannot establish that they have suffered actual damages" under Eleventh Circuit precedent. App., *infra*, 29a-30a. The sole basis for the District Court's conclusion was its finding that the Veterans "have not alleged (or proven) that they have suffered any pecuniary losses as a result of the missing external hard drive," even though they have "alleged and proven that they have suffered mental injuries such as aggravation of their PTSD symptoms." App., *infra*, 29a. The District Court further granted summary judgment on the Veterans' claims for declaratory and injunctive relief under the APA because it concluded that there had been "no final agency action" that could be challenged under the APA. App., *infra*, 32a-33a.

E. The Court of Appeals' Decision

The Court of Appeals affirmed in part and reversed in part. It affirmed the grant of summary judgment against the Veterans' Privacy Act claims based solely on it prior decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982).[6] The Court of Appeals confirmed the

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[6] The Court of Appeals' judgment is thus final with respect to Petitioners' Privacy Act claims for damages. The Court of Appeals reversed the District Court's dismissal of Petitioners' separate

circuit's bright line rule that "actual damages" in the Privacy Act "means only pecuniary losses." App., *infra*, 9a. The Court of Appeals recognized that this Court's decision in *Doe* "changed the landscape of the Privacy Act" and also overruled "the part of *Fitzpatrick* that had granted the plaintiff the statutory $1,000 minimum even though he had failed to demonstrate actual damages" under the Eleventh Circuit's test. App., *infra*, 10a. However, the Court of Appeals concluded that *Doe* did not overrule that part of *Fitzpatrick* dealing with the meaning of "actual damages" and noted that this Court had "declined to resolve" the circuit split. App., *infra*, 10a. Thus, because the Veterans "failed to show any pecuniary loss from the VA's data security breach," the Court of Appeals held that "the summary judgment against their claims for monetary damages is due to be affirmed." App., *infra*, 11a.

The Court of Appeals recognized "that most other circuits do not restrict 'actual damages' under the Privacy Act to pecuniary losses," but refused to reconsider its position. App., *infra*, 11a. The Court of Appeals also conceded that the combined effect of *Doe* and *Fitzpatrick* was that "plaintiffs in Fitzpatrick's shoes today, like Perkins and Qualls, are worse off than Fitzpatrick in 1982, because after *Doe* they cannot get even the $1,000 statutory minimum award without showing some actual damages." App., *infra*,

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APA claims for declaratory and injunctive relief and remanded those claims. App., *infra*, 18a. The remanded APA claims are separate and distinct from the Privacy Act claims underlying this petition and seek wholly different relief. Thus, review by this Court is appropriate without waiting for final resolution of the APA claims.

10a. The Court of Appeals denied a timely petition for rehearing en banc without comment.

Reasons for Granting the Petition

The petition for certiorari should be granted. The Courts of Appeals are divided on the meaning of "actual damages" in the Privacy Act and in particular whether it means pecuniary losses only. Recent rulings demonstrate that the conflict will not be resolved without intervention by this Court. The Eleventh Circuit is on the wrong side of the circuit split—its decision conflicts with this Court's current precedent on "actual" damages, basic principles of statutory interpretation, and this Court's interpretation of the Privacy Act's legislative history. It is important to resolve the conflict because a federal remedial scheme cannot function efficiently or fairly without basic nationwide rules on the scope of liability. Even the United States has recently concluded that the issue presented here is "a recurring remedial issue of national significance" and that the current circuit split is "unnecessary" and undesirable. App., *infra*, 42a.

I. There is a Conflict Among the Circuits on the Meaning of "Actual Damages" in the Privacy Act

In *Doe*, this Court recognized that "[t]he Courts of Appeals are divided on the precise definition of actual damages" in the Privacy Act. *Doe v. Chao*, 540 U.S. 614, 627 n.12 (2004). The Courts of Appeals that have addressed the issue fall into two distinct groups. The Eleventh and Sixth Circuits apply a bright line rule that "actual damages" under the Privacy Act are limited to out-of-pocket pecuniary losses only. *See*

Fitzpatrick v. IRS, 665 F.2d 327, 331 (11th Cir. 1982); *Hudson v. Reno*, 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997). In contrast, the Fourth, Fifth, and Tenth Circuits hold that other injuries, including mental injury and emotional distress, can qualify as "actual damages" under the Privacy Act without any pecuniary loss being shown. *See Doe v. Chao*, 306 F.3d 170, 181 (4th Cir. 2002);[7] *Johnson v. Dep't of Treasury*, 700 F.2d 971, 972-74, 986 (5th Cir. 1983); *Parks v. IRS*, 618 F.2d 677, 682-83 (10th Cir. 1980).[8]

This well-developed conflict will persist if not resolved by this Court. The Fifth Circuit recently reaffirmed its precedent that "actual damages" under the Privacy Act "includes emotional-distress damages" and

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[7] The Fourth Circuit's decision in *Doe* "commits [the Fourth] circuit to the position that the term 'actual damages' includes at least emotional distress that would qualify as 'demonstrable.'" 306 F.3d at 198 n.13 (Michael, J.) (concurring in part and dissenting in part).

[8] There is also a clear split among district courts in circuits in which no definitive appellate decision has been issued. *Compare, e.g., Am. Fed'n of Gov't Employees v. Hawley*, 543 F. Supp. 2d 44, 53 (D.D.C. 2008) (holding that "actual damages" under the Privacy Act include "'general compensatory damages, such as pain and suffering and non-pecuniary losses'" (quoting *Montemayor v. Fed. Bureau of Prisons*, No. 02-1283, 2005 WL 3274508, at *5 (D.D.C. Aug. 25, 2005))), and *Papse v. Bureau of Indian Affairs*, No. 99-0052-E-BLW, 2007 WL 1189369, at *2 (D. Idaho Apr. 20, 2007) ("The Court . . . concludes that the term 'actual damages' in the Privacy Act includes damages for emotional distress."), *with Pope v. Bond*, 641 F. Supp. 489, 501 (D.D.C. 1986) ("[The] plaintiff is limited to recovery on his Privacy Act claim to out-of-pocket expenses."), and *DiMura v. FBI*, 823 F. Supp. 45, 48 (D. Mass. 1993) (holding that "'actual damages' [in the Privacy Act] does not include emotional damages").

denied en banc rehearing requested by the United States. *Jacobs v. Nat'l Drug Intelligence Center*, 548 F.3d 375, 376 (5th Cir. 2008), *reh'g denied en banc*, No. 07-40776 (Jan. 6, 2009). The Eleventh Circuit, in this case, has now re-affirmed its precedent that only pecuniary losses are recoverable and has refused to reconsider that precedent en banc. Thus, the conflict among the circuits—which took root over twenty-five years ago—is deeply entrenched and can only be resolved through the intervention of this Court.

This case is an appropriate vehicle for addressing the circuit split. In *Doe*, this Court reserved decision on the meaning of "actual damages" because "the petition for certiorari did not raise it for . . . review." 540 U.S. at 627 n.12. Here, in contrast, the issue is squarely presented and is dispositive. The fact that the Veterans' injuries were not pecuniary losses was the sole basis upon which the District Court entered summary judgment dismissing the Veterans' Privacy Act claims and the sole basis upon which the Court of Appeals affirmed. App., *infra*, 11a, 29a-30a. Further, the Privacy Act claims that were dismissed are the Veterans' only claims for money damages, and the separate APA claims for declaratory and injunctive relief that were remanded seek wholly different relief and thus do not complicate this Court's review.

Moreover, unlike in *Doe*, the Veterans' injuries here are demonstrated and undisputed. In *Doe*, there was some question as to whether the plaintiff actually suffered mental injury in a demonstrated way. *See Doe*, 540 U.S. at 617-18 & n.12 (recounting Doe's conclusory allegations that he was "torn . . . all to pieces" and "greatly concerned and worried" and "assuming without deciding that the Fourth Circuit

was correct that Doe's complaints . . . did not rise to the level of alleging actual damages"). Here, in contrast, it is undisputed that the Veterans have suffered demonstrated mental injury, evidenced by traditional hallmarks such as physical manifestations and the need for prescription medication. App., *infra*, 4a, 22a, 29a. *See also Doe*, 306 F.3d at 180 ("Where . . . a plaintiff can produce evidence that emotional distress caused chest pains and heart palpitations, leading to medical and psychological treatment which included a formal diagnosis of 'major depressive disorder,' as well as necessitated prescription medication, it is clear that some amount of compensatory damages for emotional distress is warranted.").

II. The Court of Appeals' Decision is Wrong

A. The Court of Appeals' Decision is Contrary to this Court's Precedent and the Statutory Text

The Eleventh Circuit is on the wrong side of the circuit split. Its decision rests on the faulty premise that "non-pecuniary" injuries cannot be "actual injuries." That premise conflicts with this Court's jurisprudence. Under this Court's traditional view, terms like "actual injury" or "actual losses" are intended to distinguish between *demonstrated* injury and *presumed* injury—not between pecuniary and non-pecuniary losses. *Carey v. Piphus*, 435 U.S. 247, 263-64 & n.20 (1978) (contrasting "presumed" damages with damages "actually suffered" by the plaintiff and holding the later to be compensable under § 1983 including "mental suffering or emotional anguish"). Thus, harms like mental anguish and suffering are

traditionally compensable, so long as they are actually caused by the complained-of conduct. *See id.*; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986) ("[C]ompensatory damages [under § 1983] may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering[,]' . . . damages grounded in determinations of plaintiffs' actual losses.") (internal citations and quotations omitted).

This approach to "actual damages" applies with particular force in the privacy context. As Justice Ginsberg noted in *Doe*, the traditional black letter rule is that "'[t]he plaintiff [in an invasion of privacy case] may also recover damages for emotional distress or personal humiliation that he proves to have been *actually suffered* by him." *Doe v. Chao*, 540 U.S. 614, 634-35 n.4 (2004) (Ginsberg, J., dissenting) (quoting Restatement (Second) of Torts § 652H cmt. b (1976)) (emphasis added). *See also Johnson v. Dep't of Treasury*, 700 F.2d 971, 977 ("The Supreme Court has indicated that the primary damage in 'right to privacy' cases is mental distress.") (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

There is no basis in the Privacy Act for deviating from the traditional view that "actual" damages include demonstrated mental injury and emotional distress. The text of the statute contains no limits on the types of actual damages that can be recovered. The text does not say "actual *pecuniary* damages" or "actual *economic* damages" or anything of the sort. When Congress wants to place such limits on an award of damages, it knows how to do so. *See, e.g.*, 26 U.S.C. § 7432(b)(1) (limiting recovery against IRS agent for

not releasing a lien to "actual *direct economic* damages sustained by the plaintiff") (emphasis added). Courts should be hesitant to read limitations into a statute where there are none, even in the context of a statute that waives sovereign immunity. *See United States v. Kubrick*, 444 U.S. 111, 117-118 (1979) ("We should also have in mind that the Act waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended. *Neither, however, should we assume the authority to narrow the waiver that Congress intended.*") (emphasis added) (citations omitted).

In fact, the surrounding statutory context of the Privacy Act strongly suggests that Congress sought to address non-pecuniary damages through the statute's remedial scheme. Among the "other" violations of the Privacy Act that can be redressed through a claim under section 552a(g)(1)(D) is an agency's failure to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity *which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained*." 5 U.S.C. § 552a(e)(10). The VA's violation of this provision is one of the bases of the Veterans' Privacy Act claims here. App., *infra*, 25a. The Eleventh Circuit's rule fails to take this broader statutory context into account, as it should. *See Nken v. Holder*, -- U.S. --, 129 S. Ct. 1749, 1756 (2009) ("[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the

broader context of the statute as a whole.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

B. The Court of Appeals' Decision Conflicts with this Court's Interpretation of the Privacy Act's Legislative History

The Eleventh Circuit's conclusion in *Fitzpatrick* that "actual damages" means only pecuniary losses hinged exclusively on what has proven to be a misinterpretation of the Privacy Act's legislative history. *Fitzpatrick v. IRS*, 665 F.2d 327, 329 (11th Cir. 1982) ("[W]e must turn to the legislative history and attempt to discern Congressional intent on this issue."). In conducting its legislative history analysis, the Eleventh Circuit thought that Congress' deletion of the phrase "general damages" from an earlier version of the bill meant that Congress intended a "more restrictive" view of "actual damages" "that *must* refer to pecuniary loss." *Id.* at 330 (emphasis added). This is a lynchpin of the Court of Appeals' decision. *Id.* That interpretation of the legislative history, however, was discredited by this Court's later decision in *Doe*. This Court's opinion in *Doe* concluded that Congress' "deletion of 'general damages' from the bill is fairly seen, then, as a deliberate elimination of any possibility of *imputing* harm and awarding *presumed* damages." *Doe v. Chao*, 540 U.S. 614, 623 (2004) (emphasis added). In other words, as explained by this Court, the legislative history shows that Congress was drawing the line at presumed or statutory damages, not mental or emotional injury. Thus, post-*Doe*, the

Eleventh Circuit's justification for a narrow interpretation of "actual damages" is discredited.[9]

III. The United States Agrees that the Meaning of "Actual Damages" in the Privacy Act is an Issue of National Significance

The meaning of "actual damages" in the Privacy Act is an issue of national significance that should be settled by this Court. The issue involves a federal remedial scheme that applies to scores of federal agencies across the Executive Branch and to millions of individuals whose personal information those agencies handle and are obligated to protect. Even the United States concedes that the issue is "a recurring remedial issue of national significance" and that the current circuit split is "unnecessary" and undesirable. App., *infra*, 42a. Further, the lack of a nationwide rule encourages forum shopping and produces unfair results as between identical victims of the same Privacy Act violation. Finally, the Eleventh Circuit's rule is premised on an antiquated view of mental health in general and PTSD in particular and does not reflect modern scientific and societal views.

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[9] The Fifth Circuit saw the fallacy in the Eleventh Circuit's reasoning years ago and criticized it as a "nonsequitur." *Johnson v. Dep't of Treasury*, 700 F.2d 971, 982 n.29 (5th Cir. 1983) (rejecting *Fitzpatrick*'s conclusion that "actual damages" "must refer to out-of-pocket loss"). The Fifth Circuit correctly follows this Court's interpretation of the Privacy Act's legislative history and, as a result, holds that "actual damages" can include mental injury. *See id.* at 982 (explaining that the deletion of "general damages" "was rejecting liability for presumed damages," as this Court later found in *Doe*).

A. The Issue is Recurring and has Far-Reaching Impacts

The scope of "actual damages" under the Privacy Act is a recurring issue that affects a significant portion of the federal government and a large number of individuals. The requirements of the Privacy Act apply broadly to any "federal agency." 5 U.S.C. §§ 552a(1), 552(f). At present, 173 federal agencies are subject to the statute. *See* The Office of the Federal Register, The Privacy Act Compilation, http://www.federalregister.gov/Privacy/AGENCIES.aspx (last visited Oct. 16, 2009). These agencies maintain an immeasurable number of federal records containing the personal privacy information of millions of Americans. And the trend is for more and more personal information—including veterans' sensitive medical information—to be stored electronically by federal agencies and thus subject to increased risk of misuse and loss. For example, the President has recently announced a database "that will ultimately contain administrative and medical information from the day an individual enters military service throughout their military career, and after they leave the military." *See* The White House, President Obama Announces the Creation of a Joint Virtual Lifetime Electronic Record (Apr. 9, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-the-Creation-of-a-Joint-Virtual-Lifetime-Electronic-Reco/ (last visited Oct. 16, 2009).

Further, all of these Privacy Act records are subject to a recent dramatic rise in the number of data breach incidents at federal agencies involving personal privacy information. As reported by the Government Accountability Office:

> During fiscal year 2006, federal agencies reported a record number of [data breach] incidents to the U.S. Computer Emergency Readiness Team (US-CERT). For example, in 2006 there were 5,146 incident reports—a substantial increase over the 3,569 incidents reported in 2005. During this period, US-CERT recorded a dramatic rise in incidents where either physical loss or theft or system compromise resulted in the loss of personally identifiable information.

Government Accountability Office, *Information Security: Protecting Personally Identifiable Information* 5 (2008), http://www.gao.gov/new.items/d08343.pdf. Even a single one of these incidents is likely to impact a large number of individuals. In the present case alone, for example, approximately 200,000 veterans were victims of the same Privacy Act violations by the VA. This does not mean that all, or even most, of the individuals impacted by a large scale data breach will necessarily suffer the same type of demonstrated mental injury that the Veterans suffered here. But it does mean that the issue presented here is very likely to recur and should be addressed and resolved in a uniform manner by this Court.

B. The Circuit Conflict Encourages Forum Shopping and Produces Inequitable Results

The circuit split on the meaning of "actual damages" encourages forum shopping and discourages efficient administration of cases. Here, the Veterans responsibly chose to file their case in the federal district in which they live and in the city in which the

data breach occurred. This was the least burdensome venue for them (they travel to Birmingham for their medical care) and the most convenient venue for witnesses and the VA. Their reward for choosing the most logical forum is that they are entitled to no recovery because of the narrow rule that persists in the Eleventh Circuit.

Thus, the current state of the law discriminates against victims of Privacy Act violations based simply on where they live and file suit. Had another one of the 200,000 veterans impacted by this data breach suffered injuries like the Veterans and filed suit in the Fifth Circuit, they would have been entitled to at least $1,000 and their costs and attorney fees because that circuit recognizes such injuries as "actual." But by filing in the circuit where the violation occurred, the Veterans are entitled to nothing. That result is wrong, and it should not be allowed to persist.

The harshness of the Eleventh Circuit's narrow rule is further exacerbated post-*Doe*. Prior to *Doe*, even in circuits with a strict and limited view of "actual damages" (like the Eleventh Circuit), a plaintiff could enforce the requirements of the Privacy Act by seeking the statutory minimum $1,000 and costs and attorney fees. *Doe* changed this. In the words of the Court of Appeals here, "*Doe* changed the landscape of the Privacy Act." App., *infra*, 10a. The combined result of the bright line drawn in *Doe* and the bright line drawn by the Eleventh Circuit is that the Privacy Act is a toothless tiger and utterly fails as a remedial scheme. As the Eleventh Circuit candidly conceded, "plaintiffs in Fitzpatrick's shoes today, like Perkins and Qualls, are worse off than Fitzpatrick in 1982, because after *Doe* they cannot get even the $1,000 statutory

minimum award without showing some actual damages." App., *infra*, 10a. The present case is but one recent example of this draconian result. *See, e.g.*, *Mitchell v. Dep't of Veterans Affairs*, 310 Fed. App'x 351, 354 & n.3 (11th Cir. 2009) (holding that Gulf War veteran who alleged aggravated depression as a result of the VA's disclosure of his personal information to a child support claimant was entitled to no award because "*Doe* made clear that the Privacy Act guarantees $1,000 only to plaintiffs who have suffered some actual damages" and "mental injury alone is insufficient to show 'actual damages.'") (internal citations and quotations omitted)).

C. Legal Recognition of Veterans' PTSD and its Impacts Should be a National Priority

Whether aggravated PTSD and other mental injuries are recognized as "actual" injuries under federal remedial statutes like the Privacy Act is an issue of national significance that merits consideration by this Court. Review is warranted because societal attitudes and scientific knowledge about mental illnesses and conditions have advanced dramatically in the twenty-five-plus years that have elapsed since the Eleventh Circuit first barred recovery for mental injury. This is especially true regarding war-induced mental trauma like PTSD. Our nation's experiences in Vietnam, Afghanistan, and Iraq have taught us that PTSD is *real*, with *actual* consequences. According to the VA's National Center for Posttraumatic Stress Disorder:

> Scientific and clinical interest in [PTSD] has grown exponentially in the past 20 years. It is no longer considered an isolated problem for

> Vietnam veterans. PTSD is recognized as a major public health problem and a behavioral health problem for military veterans and active duty personnel subject to the traumatic stress of war, dangerous peacekeeping operations, and interpersonal violence.[10]

Unfortunately, the Eleventh Circuit's view of "actual" damages does not reflect this modern understanding of PTSD. Instead, the restrictive view of the Eleventh Circuit reflects an uninformed notion that mental injury is ephemeral and unquantifiable. Experience has debunked that outdated view.

In point of fact, federal courts today know how to assess and value actual mental injury. *See, e.g., Swenson v. U.S. Postal Service*, No. S-87-1282, 1994 U.S. Dist. LEXIS 16524, *53-54 (E.D. Cal. Mar. 10, 1994) (awarding Privacy Act plaintiff $3,000 in actual damages for "emotional distress" where agency's violations "were neither egregious nor seriously disabling"). A bright line rule barring recovery for all mental injury, no matter how severe and evident, is simply not justified or necessary. Military veterans, and others in the care of the federal government, deserve to have their actual injuries recognized, not marginalized, in federal remedial schemes like the one in the Privacy Act. Given the entrenched position of the Eleventh Circuit, review by this Court is the only way that is ever going to happen.

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[10] U.S. Dep't of Veterans Affairs, History of the National Center for PTSD, http://ncptsd.kattare.com/ncmain/about/nc_overview/history.html (last visited Oct. 16, 2009).

Conclusion

The petition for writ of certiorari should be granted. The Eleventh Circuit's minority view on the meaning of "actual damages" should be rejected and its judgment in this case reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11102

D. C. Docket No. 07-00310-CV-2-IPJ

[Filed June 17, 2009]

GREG FANIN,

Plaintiff,

JIM HENRY PERKINS, JESSIE FRANK QUALLS, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

versus

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, in his official capacity as Secretary of Veterans Affairs, ROBERT T. HOWARD, in his official capacities as Assistant Secretary for Information

and Technology and Chief Information Officer for Veterans,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

(June 17, 2009)

Before TJOFLAT and CARNES, Circuit Judges, and HOOD,* District Judge.

CARNES, Circuit Judge:

Someone pulled off the trick of making an object disappear from a safe in a darkened office building over a cold and rainy weekend. Unfortunately, the magician never completed the trick by making it reappear. The missing object is hardly a stage prop. It is an external computer hard drive belonging to the Department of Veterans Affairs (VA), which contained the unencrypted names, social security numbers, birth dates, and healthcare files of more than 198,000 living veterans. With that treasure trove of private data the hard drive is a pocket-sized gold mine for identity thieves. Where it is now is anybody's guess. In the meantime, no one is applauding the trick, least of all the veterans. Some of them have sued the VA.

* Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

I.

Among the 198,000 living veterans whose personal data was on the hard drive that disappeared are Jim Henry Perkins and Jesse Frank Qualls. Perkins and Qualls are Vietnam veterans with severe chronic post-traumatic stress disorder (PTSD). Because of their PTSD, both men participate in group therapy sessions and receive medical benefits from the VA. Both also see a doctor four times a year to update their prescriptions.

The VA issued press releases about the security breach on February 2 and 10, 2007. Shortly thereafter, it established a public hotline to answer veterans' inquiries about the status of their personal information. Perkins called and was told that individuals whose data was missing would receive a letter. In March 2007 Perkins and Qualls received letters from the VA instructing them to obtain a free credit report and to put a "fraud alert" on their credit accounts. In late April, the VA offered Perkins, Qualls, and the other 198,000 affected veterans one year of free credit monitoring.

Meanwhile, the VA's Office of the Inspector General undertook an investigation into the contents of the equipment and the circumstances of its disappearance. The missing hard drive was one of fifteen purchased in 2006 by the Birmingham VA Medical Center. The procedure was for information technology specialists to load data onto the hard drives and store them in safes each night. On the morning of January 22, 2007, an IT Specialist in Birmingham reported his external hard drive missing from the safe. The Office of the Inspector General concluded that the

VA's security plan did not comply with the agency's own rules for securing data, and it improperly allowed the IT Specialist access to databases beyond the requirements of his job and the scope of his background check. It also concluded that the VA had failed to adequately supervise the IT Specialist, whose actions had violated the Privacy Act as well as the Health Insurance Portability and Accountability Act of 1996.

This lawsuit was filed against the VA on February 15, 2007, just thirteen days after the first public disclosure that the hard drive was missing. The two current plaintiffs joined in amended complaints filed in March and April 2007. Perkins and Qualls claim the stress caused by their fear of identity theft and arising from their loss of trust in the VA as the provider of their medical care aggravated their PTSD symptoms. Both men assert that the sleeplessness, isolation, anxiety, and anger that characterize their PTSD have grown worse than before. Perkins has received additional medication from his doctor, and Qualls has had his dosage increased.

Perkins and Qualls' second amended complaint includes two broad categories of claims: those seeking monetary damages under the Privacy Act, 5 U.S.C. § 552a(g) and those seeking declaratory and injunctive relief under the Administrative Procedures Act (APA), 5 U.S.C. §§ 702–06. The APA claims are based on the VA's alleged violations of the Privacy Act, 5 U.S.C. § 552a; the EGovernment Act of 2002, 44 U.S.C. § 3501; the VA Claims Confidentiality Statute, 38 U.S.C. § 5701; the Trade Secrets Act, 18 U.S.C. § 1905; the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VHBITA), 38 U.S.C.

§§ 5721–28; and the Federal Information Security Management Act (FISMA), 44 U.S.C. §§ 3541–48. In January 2008 the district court granted the VA's motion for summary judgment against all of Perkins and Qualls' claims. This is their appeal.

II.

We review de novo the district court's grant of summary judgment. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007). Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); see also Fed R. Civ. P. 56(c). As the Supreme Court instructed us in Celotex, summary judgment should be granted when there is "a complete failure of proof concerning an essential element of the nonmoving party's case." 477 U.S. at 322–23, 106 S. Ct. at 2552.

A.

We will start with whether Perkins and Qualls have offered evidence sufficient to create a genuine issue of material fact as to each element of a claim for monetary damages under the Privacy Act, 5 U.S.C. § 552a(g)(1)(D). Congress passed the Privacy Act in 1974 to "protect the privacy of individuals identified in information systems maintained by Federal agencies." Doe v. Chao, 540 U.S. 614, 618, 124 S. Ct. 1204, 1207 (2004) (quoting the Privacy Act, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896). In addition to creating a series of security and disclosure rules for agencies that possess individuals' personal information, the Act creates a private right of action against an agency that

"fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D). It specifies that if the agency acted intentionally or willfully:

> [T]he United States shall be liable to the individual in an amount equal to the sum of— (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

We have recently stated the elements of a claim brought under this paragraph of the Privacy Act. The plaintiff must demonstrate that: (1) the government failed to fulfill its record-keeping obligation; (2) the agency acted intentionally or willfully in failing to perform its obligation; (3) the failure proximately caused an adverse effect on an individual; and (4) that individual suffered actual damages. Perry v. Bureau of Prisons, 371 F.3d 1304, 1305 (11th Cir. 2004) (quoting Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990)).

Obtaining monetary damages under § 552a(g)(4) requires proof of "actual damages," and in this circuit that means pecuniary losses. See Fitzpatrick v. IRS, 665 F.2d 327, 331 (11th Cir. 1982), abrogated on other grounds by Doe, 540 U.S. 614, 124 S. Ct. 1204. In Fitzpatrick the plaintiff retired from the IRS because of a mental disability. Id. at 328. His supervisor

violated the Privacy Act by willfully disclosing Fitzpatrick's condition to other people, which caused him to become paranoid, deeply depressed, and withdrawn from social activities because he feared that people knew of his mental condition. Id. at 328–29. However, Fitzpatrick presented no evidence of pecuniary loss such as the cost of additional medication or psychiatric care. As we noted, Fitzpatrick presented a fairly pure "key issue . . . the meaning of 'actual damages' in subsection (g)(4)(A) of the [Privacy] Act." Id. at 329. After consulting the legislative history, we held "that 'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." Id. at 331.

Under Fitzpatrick, Perkins and Qualls cannot recover monetary damages under the Privacy Act without "proven pecuniary losses." Id. Their complaint alleged that the men suffered pecuniary loss. Perkins' affidavit also states that the VA's security breach "has caused me to spend my own personal time and money to prevent and detect [identity theft]." (emphasis added). See generally Doe, 540 U.S. at 626 n.10, 124 S. Ct. at 1211 n.10 (noting that minor costs such as fees for running a credit report or receiving a Valium prescription would, as "actual damages," open the door to the statutory minimum of $1,000 in damages); Fitzpatrick, 665 F.2d at 331 n.7 (noting that "had appellant introduced evidence of expenses for psychiatric care necessitated by the disclosure, he could have recovered those expenses"). However, Perkins and Qualls have since abandoned any argument that they suffered pecuniary losses. Oral Arg. Tr. at 3:10–3:30 ("Court: One of your clients at

least pleaded that he had suffered some out of pocket [losses]. . . but then again you didn't argue it to [the district court], and didn't argue it in your blue brief to us. . . Attorney: . . . That's right."); United States v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001) ("[I]ssues and contentions not timely raised in the briefs are deemed abandoned."); Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995); Marek v. Singletary, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995).

Instead of trying to meet Fitzpatrick's requirement of actual pecuniary loss, Perkins and Qualls attack that decision directly. They argue that Fitzpatrick is distinguishable, that its reasoning is dicta, that it has been overruled or abrogated, and that it is inconsistent with decisions from other circuits. We are unpersuaded.

Perkins and Qualls attempt to march around Fitzpatrick by persuading us that it is factually distinguishable from this case. We do not think so. In that case, as in this one, a federal agency disseminated private information about the plaintiffs. In both cases the plaintiffs alleged and offered evidence that the information leak caused or aggravated stress-related symptoms—depression, paranoia, and withdrawal in Fitzpatrick and sleeplessness, anxiety, isolation and anger here. 665 F.2d at 328–29. No financial loss was shown in either case. See id. at 331 n.7. This case and Fitzpatrick are not distinguishable; they are brothers if not twins.

Nor was our discussion of the meaning of "actual damages" in Fitzpatrick dicta. See generally Aron v. United States, 291 F.3d 708, 716 (11th Cir. 2002) (Carnes, J., concurring) ("All that is said which is not

necessary to the decision of an appeal given the facts and circumstances of the case is dicta."). We noted in Fitzpatrick that "the key issue, therefore, is the meaning of 'actual damages' in subsection (g)(4)(A) of the [Privacy] Act." 665 F.2d at 329 (emphasis added). We then stated: "[W]e hold that 'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." Id. at 331 (emphasis added). Our language was purposeful and fitted to the facts. We did not over-write. The central issue in Fitzpatrick was the meaning of the statutory term "actual damages" in the Privacy Act. See id. at 329–31. We came to a conclusion about that meaning—that it meant pecuniary losses only—and then relied on that meaning to hold that Fitzpatrick had failed to establish his claim. Id. at 331. The meaning of "actual damages" was "necessary to the decision," Aron, 291 F.3d at 716; it was the sole basis we gave for denying Fitzpatrick's claims for monetary damages. See Fitzpatrick, 665 F.2d at 331. It follows that our statement that "actual damages" under the Privacy Act means only pecuniary losses is a holding, and under the prior panel precedent rule we must follow it. See Swann v. S. Health Partners, Inc., 388 F.3d 834, 837 (11th Cir. 2004) ("[W]e are bound by the holdings of earlier panels unless and until they are clearly overruled en banc or by the Supreme Court.").

Unable to march around Fitzpatrick, Perkins and Qualls attempt to tunnel under it by arguing that its holding has been "undermined to the point of abrogation" by the Supreme Court's decision in Doe, 540 U.S. at 616, 124 S. Ct. at 1206. The Doe decision did abrogate part of the Fitzpatrick decision, but not

the part we have been talking about. Doe changed the landscape of the Privacy Act by holding that the statutory minimum of $1,000 in damages was not available unless the plaintiff suffered some amount of "actual damages." Id. at 627, 124 S. Ct. at 1212. That overruled the part of Fitzpatrick that had granted that plaintiff the statutory $1,000 minimum even though he had failed to demonstrate actual damages. See 665 F.2d at 331. As a result, plaintiffs in Fitzpatrick's shoes today, like Perkins and Qualls, are worse off than Fitzpatrick was in 1982, because after Doe they cannot get even the $1,000 statutory minimum without showing some actual damages.

In deciding that a plaintiff must show actual damages to receive the statutory minimum of $1,000, the Supreme Court specifically acknowledged the circuit split about the meaning of "actual damages" and declined to resolve it. Doe, 540 U.S. at 627 n.12, 124 S. Ct. at 1212 n.12. The Court noted:

> The Courts of Appeals are divided on the precise definition of actual damages. Compare Fitzpatrick v. IRS, 665 F.2d 327, 331 (11th Cir. 1982) (actual damages are restricted to pecuniary loss), with Johnson v. Department of Treasury, IRS, 700 F.2d 971, 972–74 (5th Cir. 1983) (actual damages can cover adequately demonstrated mental anxiety even without any out-of-pocket loss). That issue is not before us, however. . . .

Id. The Court's refusal in Doe to resolve the circuit split about the definition of"actual damages" contradicts Perkins and Qualls' argument that the Court overruled Fitzpatrick's definition of that term.

Unable to undermine Fitzpatrick, Perkins and Qualls lay siege to it by arguing that most other circuits do not restrict "actual damages" under the Privacy Act to pecuniary losses. Admittedly, the Fifth and Tenth Circuits have stated that mental injury alone can qualify as "actual damages." See Johnson, 700 F.2d at 972–74; Parks v. IRS, 618 F.2d 677, 682–83 (10th Cir. 1980). But any number of assaults from other circuits cannot overrun one binding precedent from our own circuit. United States v. Hanna, 153 F.3d 1286, 1288 (11th Cir. 1998) ("In this circuit, only the court of appeals sitting en banc, an overriding United States Supreme Court decision, or a change in the statutory law can overrule a previous panel decision."); Swann, 388 F.3d at 837.

In any event, Fitzpatrick is not a lonely fort in a hostile countryside. It has allies. See Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 1997) ("[T]he weight of authority suggests that actual damages under the Privacy Act do not include recovery for 'mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries."), overruled in part on other grounds by Pollard v. E.I. DuPont Nemours & Co., 532 U.S. 843, 121 S. Ct. 1946 (2000); Pope v. Bond, 641 F. Supp. 489, 501 (D.D.C. 1986); DiMura v. FBI, 823 F. Supp. 45, 48 (D. Mass. 1993).

Because none of Perkins and Qualls' attacks on Fitzpatrick's actual damages holding succeeds, that decision controls their claims for monetary damages. They have failed to show any pecuniary loss from the VA's data security breach, and the summary judgment against their claims for monetary damages is due to be affirmed.

B.

We turn now to whether the grant of summary judgment against the claims seeking declaratory and injunctive relief was proper. The second amended complaint included nine counts alleging that the VA violated multiple statutes, including the Privacy Act, 5 U.S.C. § 552a; the E-Government Act of 2002, 44 U.S.C. § 3501 note; FISMA, 44 U.S.C. §§ 3541–48; the Trade Secrets Act, 18 U.S.C. § 1905; and the VBHITA, 38 U.S.C. §§ 5721–28. All of these claims were routed through the APA, 5 U.S.C. §§ 702–06.

1.

The district court granted summary judgment wholesale against all of Perkins and Qualls' APA claims. After listing the nine claims, the court stated:

> The court finds that the above allegations do not constitute "final agency action" as that term is defined by the APA. . . . The alleged final agency actions are failures by the defendants to comply with various provisions of federal statutes. There is no evidence that these failures can be attributed to a conscious decision by the VA to violate the law or that the VA was aware that the violations were occurring and did nothing to remedy them. In fact, after the external hard drive was reported missing, the VA investigated the disappearance and is now in the process of implementing new procedures to prevent a similar disclosure in the future. Therefore, summary judgment is due to be GRANTED on the plaintiffs' nine claims for injunctive relief because there is no final agency action.

The gist of the district court's reasoning was that the APA claims could not survive summary judgment because there was no evidence that the VA had consciously decided to violate the law and the procedures were being corrected.

The language of the APA does not state or imply, however, that an agency must consciously violate the law before a meritorious claim can arise. 5 U.S.C. §706(1) (stating that a court may "compel agency action unlawfully withheld or unreasonably delayed"). Under Norton v. S. Utah Wilderness Alliance, 542 U.S.55, 64, 124 S. Ct. 2373, 2379 (2004), a claim may proceed "where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." See also Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1239 (11th Cir. 2003) ("[W]here an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review."); Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987) (explaining that an agency's failure to act when required by law to do so, either by an implicit refusal to act or simply by an unreasonable bureaucratic delay, is reviewable under the APA). Thus, whether the VA consciously decided to violate the law is not a necessary consideration in evaluating whether it did violate the law.

Nor do current efforts by the VA to remedy its many alleged violations of various statutes matter if it has not yet achieved full compliance. Of course, if the VA were fully compliant with all of the statutes it has allegedly violated, the APA claims would be moot. See S. Utah, 542 U.S. at 67–68, 124 S. Ct. at 2381–82 (holding two of the plaintiffs' claims moot because they

sought the creation of Bureau of Land Management plans, which were later created); Friends of the Wild Swan, Inc. v. EPA, 130 F. Supp. 2d 1184, 1192 (D. Mont. 1999) (holding an APA claim moot when the EPA, thirteen years after its alleged duty arose, cured its failure to act by finally acting); Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1, 8 (D.D.C. 1997) (holding an APA claim challenging an agency's delay moot because the agency had finally acted).

But the VA has never argued that this case has become moot, and the sparse record gives us no reason to think that all of the alleged violations have been remedied since the second amended complaint was filed. And there is a wide gulf between the VA being "in the process" of implementing new procedures and it having those new procedures fully in place. Almost moot is not actually moot. See Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004) ("Defendants urge that, given the impending mootness of this case, the Court should avoid deciding the constitutional issues raised here. . . . We are not convinced. This case is not yet moot and may not be for a significant time. . . .") (internal quotation marks omitted).

Summary judgment should not have been granted wholesale on the APA claims either because any violation was not the result of a conscious decision to violate the law or because relief supposedly was on the way.[1]

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[1] This matters as to eight of the nine claims in the second amended complaint. Count 9 asserted that the VA failed to provide information security protections in violation of FISMA, 44

2.

Not wanting to have to respond to the claims retail, the VA argues that wholesale summary judgment should be affirmed on the ground that Perkins and Qualls requested broad and programmatic relief against the VA's entire information technology security system. Broad programmatic attacks against agencies are not permissible under the APA. Lujan v. Nat'l Wildlife Fed'n, 497U.S. 871, 891, 893–94, 110 S. Ct. 3177, 3190–91 (1990).

In Lujan environmentalists challenged the Bureau of Land Management's entire "land withdrawal review program." 497 U.S. at 890, 110 S. Ct. at 3189. The plaintiffs alleged that the program was rife with violations of the law—that the agency had failed to revise land use plans properly, to submit recommendations to Congress, to evaluate multiple uses of the land, to give required public notice, and to issue adequate environmental impact statements. Id. at 891, 110 S. Ct. at 3190. Instead of describing specific failings and arguing that each one was a "final agency action," the plaintiffs sought to have the entire program declared illegal. The Supreme Court did not allow that:

U.S.C. § 3541–48, but Perkins and Qualls have abandoned that claim by not pressing it before us. See Smith v. Allen, 502 F.3d 1255, 1263 n.3 (11th Cir. 2007) ("[I]ssues not raised on appeal are considered abandoned."); United States v. Mesa, 247 F.3d 1165, 1171 n.6 (11th Cir. 2001) (noting that an issue not raised during the defendant's initial appeal had been abandoned and was not part of the remand).

> [R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.

Id., 110 S. Ct. at 3190. While it conceded that successful challenges to specific final agency actions might "have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency," the Court refused to allow generalized attacks. Id. at 894, 110 S. Ct. at 3191. Systemic improvement and sweeping actions are for the other branches, not for the courts under the APA. Id.; see also S. Utah, 542 U.S. at 64, 124 S. Ct. at 2379.

At first glance, Perkins and Qualls' APA challenges seem broad and programmatic, and thus foreclosed by Lujan. Their second amended complaint, in its prayer for relief, does ask for sweeping changes to VA security procedures. However, as the Supreme Court implied in Lujan, the ban on generalized attacks does not prevent a plaintiff from bringing a handful of specialized challenges to specific "final agency actions" that, if successful, would have a broad impact on the agency's program. A proper analysis must go claim by claim, identifying each one and determining whether it is based on a "final agency action."

3.

While we might launch into that analysis ourselves, we think that the better course in this case is for the

district court to perform the retail level, claim-by-claim analysis of the APA claims in the first instance. That will allow a more thorough and hierarchical approach to the decision making. Accordingly, we remand this part of the case to the district court to determine whether each one of Perkins and Qualls' eight remaining claims seeking declaratory and injunctive relief is proper under the APA.

In making that determination the district court should keep in mind that any valid APA claim must challenge "agency action," which is defined as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The terms "rule," "order," "license," "sanction," and "relief" are individually defined by the APA. See 5 U.S.C. § 551(4–11). The phrase "or the equivalent" must be read cautiously because any agency step that is the "equivalent" of a narrow included term must also be narrow. S. Utah, 542 U.S. at 62, 124 S. Ct. at 2379.

If the claim attacks an agency's action, instead of its failure to act, and the statute allegedly violated does not provide a private right of action, then the "agency action" must also be a "final agency action." 5 U.S.C. § 704; see also S. Utah, 542 U.S. at 61–62, 124 S. Ct. at 2379; Norton, 324 F.3d at 1236 ("[F]ederal jurisdiction is similarly lacking when the administrative action in question is not 'final' within the meaning of 5 U.S.C. § 704."). "To be considered 'final,' an agency's action: (1) must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature; and (2) must be one by which rights or obligations have been determined, or from

which legal consequences will flow." U.S. Steel Corp. v. Astrue, 495 F.3d 1272, 1280 (11th Cir. 2007) (quoting Bennett v. Spear, 520 U.S. 154, 177–78, 117 S. Ct. 1154, 1168 (1997)).

If the claim challenges a failure to act, see 5 U.S.C. § 551(13), it falls under 5 U.S.C. § 706(1), which allows courts to compel agency action "unlawfully withheld or unreasonably delayed." In that case the claim may proceed only "where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." S. Utah, 542 U.S. at 64, 124 S. Ct. at 2380. "The important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a discrete action." Id. at 63, 124 S. Ct. at 2379.

On remand the district court should perform the required analysis for each of the eight remaining APA claims.

The judgment of the district court is AFFIRMED as to Count 9 of the second amended complaint and as to Counts 1 through 5 insofar as they seek monetary damages, but it is REVERSED and REMANDED as to Counts 1 through 8, insofar as they seek declaratory and injunctive relief under the APA, for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

No. 07-CV-310-IPJ

[Filed January 8, 2008]

GREG FANIN, JIM HENRY PERKINS, JESSE FRANK QUALLS, on their behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; R. JAMES NICHOLSON, in his Official Capacity as Secretary of Veterans Affairs; and ROBERT T. HOWARD, in his Official Capacities as Assistant Secretary for Information and Technology and Chief Information Officer for Veterans Affairs,

Defendants.

MEMORANDUM OPINION

Pending before the court is the defendants' Motion to Dismiss or in the alternative for Summary

Judgment (doc. 32). The defendants' motion is supported by a brief and evidentiary materials (doc. 33). The plaintiffs filed a brief in opposition to the defendants' motion which was also supported by evidentiary materials (docs. 40 & 41).[1] Finally, the defendants filed a reply to the plaintiffs' brief (doc. 45).

Also before the court is the plaintiffs' Motion for a Preliminary Injunction (doc. 14). The plaintiffs' motion was supported by a brief and evidentiary materials (docs. 15 & 16). The defendants filed a response to the plaintiffs' motion to which the plaintiffs filed a reply (docs. 30 & 42).

Upon consideration of the parties' motions, evidentiary submissions, and written arguments, the court concludes that the defendants' Motion to Dismiss or in the alternative for Summary Judgment is due to be **GRANTED** as set out below. As a result of this decision, the plaintiffs' Motion for a Preliminary Injunction is **MOOT**.

Factual Background

On January 22, 2007, a Department of Veterans Affairs ("VA") employee, who is referred to in the parties' filings as John Doe, reported to VA officials that an external computer hard drive that he was using was missing from the VA's office at the Pickwick Conference Center in Birmingham. VA Office of Inspector General's ("VA OIG") Report at p. 7. The external hard drive contained personal identifying

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[1] These documents were sealed pursuant to court order on November 27, 2007 (doc. 39).

information and individually identifiable health information pertaining to over 250,000 veterans. *Id.* The information on the hard drive included names, addresses, phone numbers, dates of birth, social security numbers, and health information such as medical diagnoses and drug prescriptions. *Id.* at 9.

A criminal investigation into the disappearance was subsequently launched by the VA OIG and the Federal Bureau of Investigation. *Id.* at 8-9. To date, the missing hard drive has not been recovered. *Id.* at 7.

On February 12, 2007, the VA began sending notification letters to veterans or their survivors "informing each recipient that one of the files on the external hard drive may have contained [his or her name], social security number, date of birth, and health information." *Id.* at 12. The last of these notification letters was sent on March 12, 2007. *Id.* On April 30, 2007, the VA sent additional letters to 198,760 living individuals in this group offering them the option of one year of free credit monitoring services. *Id.*

The plaintiffs, Jim Henry Perkins and Jesse Frank Qualls,[2] are veterans of the Vietnam war who received medical services for post traumatic stress syndrome ("PTSD") at VA hospitals in Alabama. Dec. of Jim Henry Perkins, ¶¶ 1, 2, 4; Dec. of Jesse Frank Qualls, ¶¶ 1, 2, 4. They were informed by the VA that their personal and health information may have been

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[2] Greg Fanin is no longer a plaintiff in this case. Mr. Fanin's Notice of Voluntary Dismissal was granted by this court on April 25, 2007 (doc. 20).

contained on one of the files on the portable hard drive. Dec. of Perkins, ¶ 9; Dec. of Qualls, ¶ 8. Both plaintiffs received the initial letter notifying them of the disappearance of the external hard drive and the subsequent letter informing them that they were entitled to a year of free credit services. Dec. of Perkins ¶¶ 9, 13; Dec. of Qualls ¶¶ 8, 10.

Perkins and Qualls state that the loss of the external hard drive has aggravated their PTSD symptoms and caused them to be anxious and stressed about their financial security. Dec. of Perkins, ¶ 13; Dec. of Qualls, ¶ 11. The plaintiffs have not alleged that the loss of the external hard drive has caused them any financial harm.

Standard of Review

Before the court is the defendants' Motion to Dismiss or in the alternative Motion for Summary Judgment. Because matters outside the pleadings have been presented to and considered by the court, the motion will be treated as one for summary judgment and disposed of as provided in Federal Rule of Civil Procedure 56. *See* FRCP 12(b).

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Supreme Court has explained the summary judgment standard as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23. The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrates the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324; Fed. R. Civ. P. 56(e). In meeting this burden the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 587, *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

On motions for summary judgment, the court shall construe the evidence and factual inferences arising

therefrom in the light most favorable to the nonmoving party. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The substantive law will identify which facts are material and which are irrelevant. *Anderson*, 477 U.S. at 248. All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the nonmovant. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249. The basic issue before the court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-252.

Discussion

The plaintiffs' second amended complaint contains nine causes of action for the defendants' alleged violations of the Privacy Act, 5 U.S.C. 552a; the E-Government Act of 2002, Pub. L. No. 107-347, 2002 H.R. 2458 (2002); the Federal Information Security Management Act ("FISMA"), 44 U.S.C. §§ 3541-48; the Trade Secrets Act, 18 U.S.C. § 1905; and the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("VBHITA"), 38 U.S.C. §§ 5701 *et seq*. The first five causes of action seek monetary damages and injunctive relief for the defendants' alleged violations of the Privacy Act. The plaintiffs' claims for monetary damages are brought under the private right of action created in the Privacy Act. *See* 5 U.S.C. §552a(g). The plaintiffs also seek injunctive relief for the defendants'

alleged violations of the Privacy Act under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 702. The remaining four causes of action seek injunctive and declaratory relief under the APA for the defendants' alleged violations of the E-Government Act, the FISMA, the Trade Secrets Act, and the VBHITA. The plaintiffs' five claims for monetary damages will be discussed first, and then all nine claims for injunctive relief will be discussed together.

I. The Plaintiffs' Claims for Monetary Damages Under the Privacy Act.

The plaintiffs seek monetary damages for five alleged violations of the Privacy Act by the defendants: (1) the disclosure of the plaintiffs' information without their consent in violation of 5 U.S.C. § 552a(b); (2) the failure to properly account for the disclosures of the plaintiffs' information in violation of 5 U.S.C. § 552a(c)(1); (3) the failure to maintain only relevant and necessary information about the plaintiffs in violation of 5 U.S.C. § 552a(e)(1); (4) the failure to train and supervise in violation of 5 U.S.C. § 552a(e)(9); and (5) the failure to establish appropriate safeguards in violation of 5 U.S.C. § 552a(e)(10).

To state a claim for damages under the Privacy Act, a plaintiff must allege (1) that the government failed to fulfill its record keeping obligation, (2) which failure proximately caused the adverse determination, (3) that the agency failed intentionally or willfully to maintain the records, and (4) that the plaintiff suffered actual damages. *Perry v. Bureau of Prisons*, 371 F.3d 1304, 1305 (11th Cir. 2004).

The defendants argue that their motion is due to be granted because the plaintiffs have failed to prove that they have suffered "actual damages" as that term is defined by the Eleventh Circuit Court of Appeals. The Eleventh Circuit has held that the term "'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Fitzpatrick v. Internal Revenue Service*, 665 F.2d 327, 331 (11th Cir. 1982).

Fitzpatrick involved a plaintiff who brought suit under the Privacy Act for unlawful disclosures concerning his disability discharge from the Internal Revenue Service. *Id.* at 328. To prove damages, the plaintiff introduced the testimony of a psychiatrist that the disclosures had caused the plaintiff to become paranoid about acquaintances knowing that he retired because of a mental disability. *Id.* The psychiatrist further testified that the disclosures had resulted in the plaintiff becoming deeply depressed and withdrawing from social activities. *Id.* at 328-29. The district court found that the evidence of damages was too speculative to warrant recovery, but awarded the plaintiff the statutory minimum damages and attorneys' fees. *Id.* at 329.

On appeal, the plaintiff argued that his injuries were compensable under the Privacy Act. *Id.* To determine whether the plaintiff was entitled to recover for his generalized mental injuries, the court engaged in a detailed analysis of the statute and its legislative history. *Id.* at 329-31. Based on its analysis, the court concluded that the legislative history supported a narrow reading of "actual damages" and held that the

Privacy Act permitted recovery only for proven pecuniary losses. *Id.* at 331. Therefore, the plaintiff was only entitled to recover the statutory minimum because he did not prove that he had suffered actual damages.[3] *Id.*

The plaintiffs argue that the definition of actual damages in *Fitzpatrick* is not the law of Eleventh Circuit because it has been overruled by the Eleventh Circuit and because the discussion in *Fitzpatrick* about the definition of actual damages is dicta. The plaintiffs first argue that *Fitzpatrick* was overruled and the definition of actual damages was expanded to include generalized mental injuries by the Eleventh Circuit in *Perry*. In *Perry v. Bureau of Prisons*, the *pro se* plaintiff filed a complaint against the Bureau of Prisons ("BOP") for "willfully and intentionally transferring [him] pursuant to inaccurate prison records, [] which, abridged upon [his] Right to Petition protected under the First Amendment of the United States Constitution." *Perry*, 371 F.3d at 1304. The district court characterized the complaint as a *Bivens* complaint and dismissed it for failure to state a claim. *Id.* On appeal, the plaintiff argued that the district

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[3] *Fitzpatrick's* holding that statutory damages were recoverable even without "actual damages" was overturned by the Supreme Court in *Doe v. Chao*, 540 U.S. 614, 627 (2004). In *Doe*, the Supreme Court held that the Privacy Act guarantees the $1,000.00 statutory minimum only to plaintiffs who have suffered "actual damages." *Id.* The Supreme Court also recognized the split among the circuits over the definition of "actual damages" but refused to decide the issue because it was not presented to the court. *Id.* at 627 n. 12. Therefore, *Fitzpatrick* is still the law of the Eleventh Circuit with respect to the definition of actual damages, thus proven pecuniary losses are required for recovery under the Privacy Act.

court mischaracterized the complaint as a *Bivens* complaint when he had filed it under the Privacy Act. *Id.* The Eleventh Circuit agreed that the complaint should have been characterized as a Privacy Act claim and held that the plaintiff alleged the necessary elements to state a claim for relief under the Privacy Act. *Id.* at 1305.

The plaintiffs argue that *Perry* overruled *Fitzpatrick* because Perry's claim survived a motion to dismiss for failure to state a claim even though there was no allegation of pecuniary losses. This argument must fail, however, because neither *Fitzpatrick* nor the issue of actual damages is discussed in the *Perry* opinion. "Under the prior panel rule, [an appellate panel] is bound by the holdings of earlier panels unless and until they are clearly overruled *en banc* or by the Supreme Court." *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004). Because *Perry* does not "clearly overrule" *Fitzpatrick, Fitzpatrick*'s definition of "actual damages" is binding on this court.

Both before and after the *Perry* decision, *Fitzpatrick* has been cited by the Supreme Court and multiple district courts for the definition of actual damages in the Eleventh Circuit. In *Doe v. Chao*, the Supreme Court cited *Fitzpatrick* in a footnote for the definition of actual damages in the Eleventh Circuit. *Doe*, 540 U.S. at 627 n. 12. Similarly, other district courts have cited *Fitzpatrick* for the definition of actual damages in the Eleventh Circuit. *See e.g., Schmidt v. U.S. Dep't of Veterans Affairs*, 222 F.R.D. 592, 594 (E.D. Wisc. 2004) (recognizing that in the Eleventh Circuit, "the term actual damages means only a pecuniary loss and does not include emotional distress"); *Rice v. U.S.*, 245 F.R.D. 3, 6 (D.D.C. 2007)

(recognizing that in the Eleventh Circuit, "actual damages are restricted to pecuniary loss"); *Stafford v. Soc. Sec. Admin.*, 437 F.Supp.2d 1113, 1124 (N.D. Cal. 2006); *Foncello v. U.S. Dep't of Army*, 2005 WL 2994011 * 4 (D. Conn. 2005). Moreover, *Perry* is not on point, as the Court does not discuss the issue of damages or the merits of the plaintiff's complaint.

The plaintiffs' second argument must also fail because the language in *Fitzpatrick* limiting actual damages to proven pecuniary losses is not dicta. Prior Eleventh Circuit decisions have defined dicta as discussion in an opinion about an issue that is not presented to the court. *See U.S. v. Lett*, 483 F.3d 782, 790 (11th Cir. 2007). According to the *Fitzpatrick* Court, the "key issue" was "the meaning of actual damages." *Fitzpatrick*, 665 F.2d at 329. Therefore, the Court's determination of the meaning of actual damages is the holding of the opinion and not dicta. This conclusion is supported by the clear language of the opinion. *See id.* at 331 ("we hold that 'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries.")

Because the plaintiffs have failed to show that *Fitzpatrick* is not the law of this Circuit, it must be applied to the facts of the present case. Here, the plaintiffs have only alleged and proven that they have suffered mental injuries such as aggravation of their PTSD symptoms and anxiety over their financial security. The plaintiffs have not alleged (or proven) that they have suffered any pecuniary losses as a result of the missing external hard drive. Therefore, the plaintiffs cannot establish that they have suffered

actual damages and summary judgment is due to be GRANTED on the plaintiffs' five claims for monetary damages under the Privacy Act.

II. The Plaintiffs' Claims for Injunctive Relief Under the APA.

The plaintiffs contend that even if they are not entitled to recover monetary damages, they are nevertheless entitled to injunctive and declaratory relief. The plaintiffs bring nine causes of action for declaratory and injunctive relief. Five of the claims are for alleged violations of the Privacy Act and four of the claims are for alleged violations of the E-Government Act, the FISMA, the Trade Secrets Act, and the VBHITA. All nine of the plaintiffs' claims for injunctive relief are brought under the APA, and thus will be discussed together.

As a preliminary matter, the defendants argue that plaintiffs have improperly pleaded their claims for injunctive relief. However, the plaintiffs' Second Amended Complaint cites the proper APA section and also asks in the prayer for relief for declaratory and injunctive relief. The court finds that the plaintiffs' Second Amended Complaint was sufficient to put the defendants on notice that the plaintiffs' claims were being brought under the APA.

Even if the plaintiffs' complaint is proper, the defendants argue that the plaintiffs are not entitled to injunctive or declaratory relief under the APA. The relevant section of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to

judicial review thereof." 5 U.S.C. § 702. Only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to review." 5 U.S.C. § 704. Agency action is considered "final" when (1) the action marks the consummation of the agency's decisionmaking process and (2) the action is one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

The plaintiffs argue that the following alleged actions constitute "final agency action:" (1) the defendants' disclosure of the plaintiffs' information without the plaintiffs' consent; (2) the defendants' failure to record the transfer of the plaintiffs' information from the VA computers to the external hard drive; (3) the defendants's failure to record the relinquishment of the plaintiffs' information to an unidentified third party; (4) John Doe's[4] downloading of the plaintiffs' information to the external hard drive; (5) the defendants' failure to establish effective rules of conduct and instruct their employees on those rules; (6) the defendants' failure to establish appropriate safeguards; (7) the defendants' failure to conduct a Privacy Impact Assessment prior to procuring the external drive, in violation of Section 208 of the E-Government Act; (8) permitting John Doe to download plaintiffs' confidential information without following security rules, in violation of the Trade Secrets Act and the Veterans Confidentiality Statute; and (9) the defendants' failure to comply with VA

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[4] John Doe was the VA employee responsible for the external hard drive that was stolen.

information security policies and failure to issue required handbooks, in violation of the VBHITA.

The court finds that the above allegations do not constitute "final agency action" as that term is defined by the APA. Here, unlike in the typical APA case, the defendants' actions are not the end of the defendants' decisionmaking process nor do they determine any rights or obligations. *See Fla. Home Builders Assoc. v. Norton*, 496 F. Supp. 2d 1330, 1334 (M.D. Fla. 2007) ("Defendants' failure to conduct mandatory, nondiscretionary status reviews is an agency action, but it is not a final agency action. It is neither the ultimate end of the agency's decisionmaking process, nor does it determine any rights or obligations. Moreover, Plaintiff has not attempted to establish that Defendant's failure to act constitutes final agency action.").

The alleged final agency actions are failures by the defendants to comply with various provisions of federal statutes. There is no evidence that these failures can be attributed to a conscious decision by the VA to violate the law or that the VA was aware that the violations were occurring and did nothing to remedy them. In fact, after the external hard drive was reported missing, the VA investigated the disappearance and is now in the process of implementing new procedures to prevent a similar disclosure in the future. Therefore, summary judgment is due to be GRANTED on the plaintiffs' nine claims for injunctive relief because there is no final agency action.

Conclusion

Having considered the foregoing, and being of the opinion the defendants are entitled to judgment in their favor as a matter of law, it is therefore **ORDERED** by the court that the defendants' Motion to Dismiss or In the Alternative for Summary Judgment is **GRANTED**, the court finding no genuine issues of material fact remain. Accordingly, the plaintiffs' Motion for a Preliminary Injunction is **MOOT**.

DONE and **ORDERED** this the 8th day of January 2008.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

No. 07-CV-310-IPJ

[Filed January 8, 2008]

GREG FANIN, JIM HENRY PERKINS, JESSE FRANK QUALLS, on their behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; R. JAMES NICHOLSON, in his Official Capacity as Secretary of Veterans Affairs; and ROBERT T. HOWARD, in his Official Capacities as Assistant Secretary for Information and Technology and Chief Information Officer for Veterans Affairs,

Defendants.

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith,

Pending before the court is the defendants' Motion to Dismiss or in the alternative for Summary Judgment (doc. 32) and the plaintiffs' Motion for a Preliminary Injunction (doc. 14). Having considered

the defendants' Motion to Dismiss or in the alternative for Summary Judgment and being of the opinion that no genuine issues of material fact remain and that the defendants are entitled to judgment in their favor as a matter of law;

It is therefore **ORDERED** that said motion be and hereby is **GRANTED** as to all of the plaintiffs' claims. Plaintiffs' claims against the defendants are **DISMISSED WITH PREJUDICE.** Accordingly, the plaintiffs' Motion for a Preliminary Injunction is **MOOT**. Each party shall bear its own costs.

DONE and **ORDERED** this the 8th day of January 2008.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-11102-GG

[Filed August 5, 2009]

GREG FANIN,

Plaintiff,

JIM HENRY PERKINS, JESSIE FRANK QUALLS, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

versus

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, in his official capacity as Secretary of Veterans Affairs, ROBERT T. HOWARD, in his official capacities as Assistant Secretary for Information and Technology and Chief Information Officer for Veterans,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT AND CARNES, Circuit Judges, and HOOD*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

---

* Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

APPENDIX D

The Privacy Act
5 U.S.C. § 552a(e)(10), (g)(1)(D), (g)(4)
(Excerpts)

* * *

(e) **Agency Requirements.**— Each agency that maintains a system of records shall—

* * *

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained[.]

* * *

(g)

(1) **Civil remedies.**— Whenever any agency

* * *

(D) fails to comply with any other provision of this section, or any rule promulgated

thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

* * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

* * *

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-40776

[Filed December 24, 2008]

GARY G. JACOBS,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
NATIONAL DRUG INTELLIGENCE CENTER,	)
	)
Defendant-Appellant.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

PETITION FOR REHEARING EN BANC FOR APPELLANT, NATIONAL DRUG INTELLIGENCE CENTER

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* * *

I

THIS CASE MERITS REHEARING EN BANC BECAUSE THE PANEL'S DECISION PRESERVES A CLEAR CIRCUIT SPLIT ON AN IMPORTANT ISSUE AS TO THE SCOPE OF THE DAMAGES REMEDY AVAILABLE TO PRIVACY ACT PLAINTIFFS

The Federal Rules of Appellate Procedure (FRAP) Advisory Committee notes to the 1998 amendment to FRAP 35, introducing inter-circuit conflict as a ground for rehearing en banc, describe the very circumstances presented here. Thus, the Committee references a "situation that may be a strong candidate" as "one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict" (emphasis added). Not only has no other circuit joined Johnson, its mode of analysis is repudiated by subsequent sovereign immunity decisions of both the Supreme Court and this Court.

Importantly, the Advisory Committee notes also cite that very circumstance - "conflicts between the circuits may remain unresolved for an extended period of time." The notes point out "the limitation on the number of cases the Supreme Court can hear," and explain that "an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts." Over four years ago, Doe reserved decision on what are "actual damages." 540 U.S. at 627 n.12. And here, the panel acknowledged the "at least" 25 years long duration of the circuit split.

That conflict is on a recurring remedial issue of national significance, one involving the balance between affording proper redress for Privacy Act violations while not creating an undue open-ended liability. And the conflict is "unnecessary." As Hudson shows, a "present day analysis" would end it. See United States v. Hill, 48 F.3d 228, 232 (7th Cir. 1995) ("[I]f upon conscientious reexamination we are persuaded that other circuits have the better of the argument, we should abandon our position in order to spare the Supreme Court the work."). Thus, as envisioned by the Committee, rehearing en banc would fulfill the Court's critical role in the proper functioning of the federal judicial system.

* * *

Supreme Court, U.S.
FILED
JAN 29 2010
OFFICE OF THE CLERK

No. 09-513

In the Supreme Court of the United States

JIM HENRY PERKINS, ET AL., PETITIONERS

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff must demonstrate pecuniary loss in order to establish "actual damages" under the Privacy Act, 5 U.S.C. 552a.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 572 F.3d 868. The memorandum opinion of the district court (Pet. App. 19a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2009. A petition for rehearing was denied on August 5, 2009 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on October 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act (Act), 5 U.S.C. 552a, establishes requirements for Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual" when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). The Act also authorizes private civil actions to enforce its terms. 5 U.S.C. 552(g).

Certain provisions of the Act are enforceable only by an order of declaratory or injunctive relief. See 5 U.S.C. 552a(g)(4) (limiting damages to suits brought under "subsections (g)(1)(C) or (D)"). Other provisions of the Act authorize an award of money damages against the United States. To obtain monetary relief, a plaintiff first must establish that a covered agency violated one of the relevant provisions of the Act or a rule promulgated under the Act. See 5 U.S.C. 552a(g)(1)(C) and (D). Second, depending on the provision involved, the plaintiff either must demonstrate that the violation resulted in "a determination" that was "adverse" to him or had some other form of "adverse effect" on him. 5 U.S.C. 552a(g)(1)(C) and (D). Third, the plaintiff must show that the violation was "intentional or willful." 5 U.S.C. 552a(g)(4). Finally, the plaintiff must demonstrate that he sustained "actual damages * * * as a result of" the violation. 5 U.S.C. 552a(g)(4)(A); see *Doe* v. *Chao*, 540 U.S. 614, 624-625 (2004) (holding that a showing of "actual damages" is a necessary element of "a complete cause of action").

2. On January 22, 2007, an employee of the Department of Veterans Affairs (VA) reported that an external hard drive containing personal identifying information relating to more than 198,000 living veterans was miss-

ing from a safe in the VA's offices in Birmingham, Alabama. Pet. App. 2a, 20a. The FBI and the VA's Office of the Inspector General opened a criminal investigation. *Id.* at 21a. We have been advised that the missing hard drive has not been recovered. We further have been advised that no evidence has been uncovered that the information contained on the missing hard drive ever has been accessed or used fraudulently.

The VA took numerous steps to notify potentially affected veterans about the security breach and to advise them about how to proceed. The VA issued press releases about the security breach on February 2, 2007, and again on February 10, 2007. Pet. App. 3a. It also established a public hotline to answer veterans' questions, and began sending notification letters to veterans about the incident on February 12, 2007. *Id.* at 3a, 21a. In that initial mailing, the VA advised veterans to obtain a free credit report and to put a "fraud alert" on their credit cards. *Id.* at 3a. On April 30, 2007, the VA sent an additional letter to 198,760 then-living veterans in which it offered to provide them with free credit monitoring services for a one-year period. *Id.* at 21a.

3. Petitioners are veterans whose personal data were on the missing hard drive. Pet. App. 3a. On February 15, 2007—13 days after the VA's first public announcement about the missing hard drive—petitioners filed suit in federal district court. *Id.* at 4a. As subsequently amended, petitioners' nine-count complaint "includes two broad categories of claims: those seeking monetary damages under the Privacy Act, 5 U.S.C. § 552a(g) and those seeking declaratory and injunctive relief under the Administrative Procedure[] Act (APA), 5 U.S.C. §§ 702-706." Pet. App. 4a. The APA claims

"are based on the VA's alleged violations of" five statutes, including the Privacy Act. *Ibid.*

4. The district court granted summary judgment in favor of respondents. Pet. App. 19a-33a. With respect to petitioners' claims for money damages under the Privacy Act, the district court noted that "[t]he Eleventh Circuit has held that the term 'actual damages as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries.'" *Id.* at 26a (additional internal quotation marks omitted) (quoting *Fitzpatrick* v. *IRS*, 665 F.2d 327, 331 (11th Cir. 1982)). Because petitioners "ha[d] not alleged (or proven) that they suffered any pecuniary losses as a result of the missing external hard drive," the district court concluded that they had failed to "establish that they have suffered actual damages," and thus were ineligible for monetary relief under the Privacy Act. *Id.* at 29a-30a. The district court also concluded that respondents were entitled to summary judgment with respect to plaintiffs' claims for declaratory and injunctive relief under the APA. *Id.* at 30a-32a.

5. A unanimous panel of the court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-18a.

With respect to petitioners' claims for money damages under the Privacy Act, the court of appeals affirmed the district court's holding that petitioners had failed to "offer[] evidence sufficient to create a genuine issue of material fact as to each element of a claim." Pet. App. 5a; see *id.* at 5a-11a. The court acknowledged that other courts "have stated that mental injury alone can qualify as 'actual damages'" under the Privacy Act, *id.* at 11a, but it agreed with the district court that its

previous decision in *Fitzpatrick* had interpreted that term to require "pecuniary losses," *id.* at 6a, and it rejected petitioners' assertion that this Court's subsequent decision in *Doe* had undermined *Fitzpatrick*'s holding with respect to that point, *id.* at 9a-10a. The court of appeals thus affirmed the district court's judgment with respect to Count 9 of plaintiff's complaint "and as to Counts 1 through 5 insofar as they seek monetary damages." *Id.* at 18a.

In contrast, the court of appeals reversed the district court's grant of summary judgment with respect to the APA claims and remanded for further proceedings. Pet. App. 12a-18a. The court of appeals rejected the district court's reasoning "that the APA claims could not survive summary judgment because there was no evidence that the VA had consciously decided to violate the law and the procedures were being corrected," concluding that "[t]he language of the APA does not state or imply * * * that an agency must consciously violate the law before a meritorious claim can arise." *Id.* at 13a. The court of appeals thus remanded to permit the district court "to perform the retail level, claim-by-claim analysis of the APA claims in the first instance." *Id.* at 16a-17a.

ARGUMENT

Petitioners renew their claim (Pet. 11-23) that "actual damages" under the Privacy Act, 5 U.S.C. 552a, are not restricted to pecuniary losses. That contention does not merit further review.

1. The petition for a writ of certiorari should be denied because this case is in an interlocutory posture. The court of appeals reversed the district court's judgment at least in part with respect to eight of the nine

counts in petitioners' complaint and remanded to the district court for further proceedings on those counts. Pet. App. 18a. Following the district court's final disposition of the case, petitioners will be able to raise their current claims—together with any other claims that may arise as a result of the additional proceedings on remand—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).[1]

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[1] Following the court of appeals' remand in this case, petitioners agreed to the dismissal of several of their remaining claims but continue to pursue relief in the district court on four counts of their second amended complaint, including several claims based on the Privacy Act. See 07-cv-310 Docket entry No. 56 (N.D. Ala. Nov. 20, 2009) (Status Report) (asserting claims under 5 U.S.C. 552a(c)(1) and (e)(10)). The latest round of briefing on the remaining counts will not be complete until March 19, 2010. See 07-cv-310 Docket entry No. 59 (N.D. Ala. Dec. 14, 2009).

Notwithstanding these ongoing developments in the district court, petitioners assert that this Court's immediate review is appropriate because the remaining claims "are separate and distinct from the Privacy Act claims underlying this petition" for a writ of certiorari. Pet. 10 n.6. That assertion does not alter the interlocutory posture of this case, and it is incorrect in any event. Although the claims currently proceeding before the district court do not involve a request for money damages, the factual background of those claims is the same as that underlying petitioners' damages claims, and the ongoing litigation in the district

2. In any event, the decision of the court of appeals is correct. The Privacy Act authorizes monetary relief against the United States, and the requirement that the plaintiff plead and prove "actual damages" is part of the "complete cause of action." *Doe* v. *Chao*, 540 U.S. 614, 624 (2004). Accordingly, the proper interpretation of that term is guided by the "common rule, with which [this Court] presume[s] congressional familiarity," that the federal government is immune from suit unless it has expressly waived its sovereign immunity. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (*Department of Energy*). Any waiver of immunity, moreover, must be "unequivocally expressed" and "not enlarged beyond what the language requires." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (internal alterations and quotation omitted).

This Court has made clear that the principle that waivers of sovereign immunity must be narrowly construed applies not only to determining the existence of a waiver but also to determining its scope. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (stating that the Court has "frequently held" that a statutory waiver of the United States' sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign"). In *Department of Energy*, for example, the Court applied that canon in construing the scope of the United States' waiver of its immunity against "sanctions" for violating the Clean Water Act, 33 U.S.C. 1251 *et seq.* 503 U.S. at 626-627. And in *Price* v. *United States*, 174 U.S. 373 (1899), the Court applied in the same principle in determining

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court could shed light on whether respondents engaged in "intentional or willful" conduct, which is an another essential element of a claim for money damages under the Privacy Act. See 5 U.S.C. 552a(g)(4).

whether a waiver of the government's immunity from suit for actual damages for property taken by Indians also encompassed a waiver of immunity for consequential damages. *Id.* at 375-376.

The Privacy Act does not define "actual damages," and the term has no consistently accepted meaning. See *Fitzpatrick* v. *IRS*, 665 F.2d 327, 329 (11th Cir. 1982) ("Unlike general, special, and compensatory damages, * * * 'actual damages' has no consistent legal interpretation," and "courts have used 'actual damages' in a variety of circumstances, with the interpretation varying with the context of use."); accord *Johnson* v. *IRS*, 700 F.2d 971, 974 (5th Cir. 1983) ("the term 'actual damages' has no plain meaning or consistent legal interpretation"); *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997) (same), cert. denied, 525 U.S. 822 (1998).[2] As a result, the term as used in the Privacy Act must be "narrowly interpreted," *ibid.*, and it is at least reasonable to construe "actual damages" as encompassing only pecuniary losses and excluding harms that are purely non-economic in nature. See *Fitzpatrick*, 665 F.2d at

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[2] See *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977) (finding "that there is no generally accepted definition of 'actual damages' in American law"); see also, *e.g.*, *Black's Law Dictionary* 416 (8th ed. 2004) (noting that "actual damages" may be termed "*compensatory damages*" but may also be termed "*tangible damages*" or "*real damages*"); 25 C.J.S. *Damages* § 3, at 320-321 (2002) (footnotes omitted) (explaining that "actual damages" may be used synonymously "with 'compensatory damages' and with 'general damages,'" but then noting that "actual damages" themselves "may be either general or special," and going on to explain that, alternatively, "actual damages" may be used "to indicate such losses as are actually sustained and are susceptible of measurement, and as used in this sense the phrase 'determinate pecuniary loss' has been suggested as a more appropriate designation").

331. Moreover, an examination of the Act as a whole, including the directive to the Privacy Protection Study Commission to submit a report on whether the federal government should also be liable for "general damages," see pp. 10-11, *infra*, confirms that that interpretation is correct.

This Court's decisions in *Carey* v. *Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), on which petitioners rely (Pet. 14-15), are not to the contrary. Neither of those decisions involved the meaning of the statutory term "actual damages." In addition, there was no clear statement rule at issue in either *Carey* or *Stachura*, because the statute at issue in those cases (42 U.S.C. 1983) neither waives the United States' sovereign immunity nor abrogates the immunity possessed by the States. See *Quern* v. *Jordan*, 440 U.S. 332, 340-341 (1979).

Petitioners also assert (Pet. 17-18) that the Privacy Act's legislative history supports the view that the term "actual damages" includes non-pecuniary harms. That argument is doubly flawed. First, this Court has made clear that "legislative history has no bearing on the ambiguity point." *Nordic Vill.*, 503 U.S. at 37; accord *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (stating that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text").

Second, the statute's history refutes any suggestion that the term "actual damages" was meant to include non-pecuniary harms. As several lower courts have observed, the legislative history of the Privacy Act indicates that Congress, "concerned about the drain on the treasury created by a rash of Privacy Act suits, indicated its intention to limit 'actual damages' to 'out-of-pocket' expenses." *Pope* v. *Bond*, 641 F. Supp. 489, 501

(D.D.C. 1986) (citations omitted); see *Fitzpatrick*, 665 F.2d at 330 ("Throughout the Privacy Act debate, a central concern was the scope of potential government liability for damages.").

In addition, as this Court noted in *Doe*, the Senate version of the bill that became the Privacy Act "would have authorized an award of 'actual *and general* damages sustained by any person," but the italicized language "was trimmed from the final statute." 540 U.S. at 622-623 (quoting S. 3418, 93d Cong., 2d Sess. § 303(c)(1) (1974) (as passed by the Senate)) (emphasis added). Instead, the final legislation established a Privacy Protection Study Commission and charged it with preparing a report regarding various matters, including "*whether* the Federal Government should be liable for general damages incurred by an individual as a result of a willful or intentional violation" of certain provisions of the Privacy Act. Privacy Act of 1974, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907 (emphasis added).

This legislative history "indicates beyond serious doubt that general damages are not authorized" under the Privacy Act. *Doe*, 540 U.S. at 622. This Court also has noted the "parallel[ism]" between the Privacy Act's remedial scheme and that of "certain defamation torts" that at common law required a plaintiff to "prove[] some special harm, *i.e.*, harm of a material and generally of a pecuniary nature." *Id.* at 625 (internal quotation marks and citation omitted). Accordingly, as the Privacy Protection Study Commission concluded, the most natural conclusion is that the term "actual damages" in the Privacy Act is "intended as a synonym for special damages as that term is used in defamation cases," which were limited to "tangible pecuniary" losses and excluded "intangible" injuries such as "loss of reputation, chilling of

constitutional rights, or mental suffering (where unaccompanied by other secondary consequences)." *Fitzpatrick*, 665 F.2d at 331 (quoting *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (1977)).

Finally, petitioners' suggestion (Pet. 21) that the court of appeals' decision renders the Privacy Act's remedial scheme a failure misapprehends the limited role of damages under the Privacy Act. There is no question that Congress did not make damages available for all violations of the Privacy Act. For example, notwithstanding the fact that both types of violation can cause both pecuniary and non-pecuniary harms, no damages are available for an agency's unlawful refusal to grant an individual access to his records or to amend his record. See 5 U.S.C. 552a(g)(4) (listing provisions whose violation authorize money damages). And even when an agency violates a provision that potentially authorizes money damages, such damages are unavailable unless the violation "was intentional or willful," *ibid.*, regardless of the nature or degree of harm suffered by the plaintiff as a result. By the same token, concern about exposing the federal fisc to claims for non-pecuniary, intangible harms—which have no market values and thus are particularly difficult to quantify objectively—is neither novel nor irrational.

3. As this Court observed in *Doe*, there is a conflict in the circuits about "the precise definition of actual damages" under the Privacy Act. 540 U.S. at 627 n.12. That conflict, however, has existed for more than 25 years, and it is narrower than petitioners assert. In addition, this case would not be an appropriate vehicle for resolving the conflict in any event.

As this Court noted in *Doe*, see 540 U.S. at 627 n.12, the Eleventh Circuit's 1982 decision in *Fitzpatrick* (which formed the basis for the Eleventh Circuit's decision in this case) conflicts with the Fifth Circuit's 1983 decision in *Johnson*. Compare *Fitzpatrick*, 665 F.2d at 331 ("we hold that 'actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries"), with *Johnson*, 700 F.2d at 972 ("This Court holds that the term 'actual damages' under the Privacy Act does indeed include damages for physical and mental injury for which there is competent evidence in the record, as well as damages for out-of-pocket expenses.").

Since *Johnson* was decided in 1983, no other court of appeals has adopted its interpretation of the words "actual damages" in the Privacy Act. To the contrary, "the weight of authority suggests that actual damages under the Privacy Act do not include recovery for mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Hudson*, 130 F.3d at 1207 (internal quotation marks omitted); see *Jacobs* v. *National Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (following *Johnson*'s holding as binding circuit precedent, but declining to decide "whether a present-day analysis of damages recoverable under the Privacy Act would differ from *Johnson*" in light of current sovereign immunity jurisprudence).

Petitioners err in asserting (Pet. 12) that the Fourth and Tenth Circuits have held that "mental injuries and emotional distress[] can qualify as 'actual damages' under the Privacy Act without any pecuniary loss being shown." The Fourth Circuit decision on which petitioners rely flagged the issue and then expressly refrained

from deciding it. See *Doe* v. *Chao*, 306 F.3d 170, 181 (2002) ("Under these circumstances, we need not reach the issue of whether the term 'actual damages' as used in the [Privacy] Act encompasses damages for non-pecuniary emotional distress because, regardless of the disposition of that issue, Buck Doe's claims fail for lack of evidentiary support."), aff'd, 540 U.S. 614 (2004); see also *Albright* v. *United States*, 732 F.2d 181, 185-186 (D.C. Cir. 1984) ("find[ing] no need to reach" whether "damages under the Privacy Act are * * * limited to out-of-pocket expenses").

There likewise is no conflict between the court of appeals' decision in this case and the Tenth Circuit's pre-*Fitzpatrick* and pre-*Johnson* decision in *Parks* v. *IRS*, 618 F.2d 677 (1980). *Parks* did state that plaintiffs who alleged that they "suffered psychological harm" as a result of Privacy Act violations had stated "viable claims for damages * * * which [were] sufficient to withstand [a] motion to dismiss." *Id.* at 683, 685. In reaching that conclusion, however, the Tenth Circuit never considered the meaning of the words "actual damages," and it appears that the parties to that case did not raise the issue presented here. See *id.* at 680 (summarizing the district court's reasoning and the parties' positions on appeal). Indeed, contrary to this Court's later holding in *Doe*, see 540 U.S. at 624-625, the *Parks* court appears to have viewed a plaintiff's ability to establish "actual damages" as going to the determination of the proper remedy rather than to the plaintiff's ability to state a claim for monetary relief in the first place. See 618 F.2d at 683.[3]

[3] Petitioners also assert (Pet. 12 n.8) that there is "a clear split among district courts in circuits in which no definitive appellate decision has been issued." Any such conflicts can be resolved by the courts of appeals and provide no basis for this Court's review.

Regardless of whether the longstanding and currently narrow conflict in the circuits would warrant this Court's resolution in an appropriate case in the future,[4] the issue does not warrant review at this time. As noted previously, this case currently is in an interlocutory posture, and further developments in the district court may shed light on whether plaintiffs' claims for money damages under the Privacy Act would fail for reasons that are independent of those raised by this petition for a writ of certiorari. See pp. 5-6 & note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
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JANUARY 2010

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[4] The same issue currently is pending before the Ninth Circuit in *Cooper* v. *FAA*, No. 08-17074 (argued Jan. 13, 2010).

Supreme Court, U.S.
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No. 09-513

In The
Supreme Court of the United States

JIM HENRY PERKINS AND JESSIE FRANK QUALLS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF VETERANS AFFAIRS, AND ROBERT T. HOWARD, IN HIS OFFICIAL CAPACITIES AS ASSISTANT SECRETARY FOR INFORMATION AND TECHNOLOGY AND CHIEF INFORMATION OFFICER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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Argument

The established split in the circuits on the question presented here has now expanded to include the Ninth Circuit. On February 22, 2010, the Ninth Circuit decided the issue of whether "actual damages" under the Privacy Act encompasses both pecuniary and non-pecuniary damages. *Cooper v. Fed. Aviation Admin.*, No. 08-17074, slip op. 2815 (9th Cir. Feb. 22, 2010). The Ninth Circuit held that it does:

> Having reviewed the text, purpose, and structure of the Act, as well as how actual damages has been construed in other closely analogous statutes, we hold that Congress intended the term actual damages in the Act to encompass both pecuniary *and* nonpecuniary injuries.

Cooper, slip op. at 2835 (emphasis in original).

The Ninth Circuit's decision puts the Eleventh Circuit squarely on the minority side of the circuit split. Pet. 11-14. And it further negates Respondents' already spurious argument that the circuit split is a "narrow" one. Br. in Opp. 14. Even by Respondents' count, there are now four circuits that have weighed in on the issue presented. Br. in Opp. 12 (conceding split among Eleventh, Fifth, and Sixth Circuits).[1] There are

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[1] It is also worth noting that the Ninth Circuit rejected the sovereign immunity argument that Respondents argue would validate the Eleventh Circuit's minority position. *Cooper*, slip op. at 2835-2838.

now six circuits by Petitioners' count. Pet. 12 (explaining Fourth and Tenth Circuit precedent).

The fact that the United States may at some point seek certiorari in *Cooper* is no reason to deny review here. As the United States noted in its letter to the Clerk of February 23, 2010, the United States has not even "determined whether it will seek rehearing en banc in [*Cooper*]." Thus, it is entirely speculative as to whether *Cooper* will ever be presented to this Court for review.

In any case, the present case would constitute a superior vehicle for this Court's review. In its decision, the Ninth Circuit noted that the government disputed the "evidence regarding [Cooper's] nonpecuniary injuries" and held that, "on remand, the district court has discretion to entertain motions from the parties regarding whether Cooper has proffered sufficient evidence of his nonpecuniary injuries to prove actual damages under the Act." *Cooper*, slip op. at 2838 n.4. Thus, *Cooper* arises in a genuinely interlocutory posture, because there are unresolved factual issues that may bear on the availability of damages for nonpecuniary injuries. In this case, by contrast, the Veterans' nonpecuniary injuries are undisputed. Pet. 13-14; Br. in Reply 1 n.2.

Conclusion

For the foregoing reasons, and those stated in the Veterans' petition for writ of certiorari and reply brief, the petition for a writ of certiorari should be granted.[2]

Respectfully submitted,

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[2] If the Court has some question as to whether this case or *Cooper* is a more appropriate vehicle for review, the Veterans respectfully suggest that one alternative is for the Court to hold their petition for writ of certiorari in abeyance, pending the United States' decision to seek certiorari in *Cooper* or not.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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Reply Brief

Respondents concede every major point that counsels in favor of this Court's review. Respondents concede, as they must, the recurring and well-established split in the circuits on the precise question presented. Br. in Opp. 11-12. And they offer no possible scenario under which that split could be resolved without intervention of this Court. *Id.*

Respondents further implicitly concede that the question presented is an issue of national significance on an important question of federal law.[1] Respondents' suggestion that the conflict is a "narrow" one (Br. in Opp. 14) is belied by the fact that scores of federal agencies and millions of American citizens have a stake in what are "actual damages" under the Privacy Act, a point that Respondents do not dispute. Pet. 18-22. The United States, it seems, would like the issue to be addressed by this Court, but just not in this case given its egregious underlying facts and the Veterans' undisputed injuries. Pet. 4-8. However, no future case will offer a cleaner presentation of the issue for this Court's resolution.[2]

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[1] The United States has explicitly conceded this point in other proceedings. Pet. App. 42a.

[2] Importantly, Respondents do not dispute that the Veterans' injuries in this case are, in fact, "demonstrated mental injury, evidenced by traditional hallmarks such as physical manifestations and the need for prescription medication." Pet. 14. Thus, the question presented is a pure legal issue, with no complicating factual issues, as were present in *Doe v. Chao*, 540 U.S. 614 (2004). Pet. 13-14.

The one reason that Respondents offer against review—that this case is in an "interlocutory posture"—is makeweight and ill-founded. To be clear: the Privacy Act claims here are *not* in an interlocutory posture. *All* of the Veterans' claims under the Privacy Act have been dismissed by final judgment. Pet. App. 18a, 33a. There will be no further proceedings or lower court rulings on the issue of "actual damages," which is the only question presented for review. There simply will be no further development or maturation of this issue that would assist this Court in its review. The best that Respondents can say is that the facts underlying the Veterans' remaining Administrative Procedure Act ("APA") claims may be relevant to another *different* element of a Privacy Act claim—the "intentional or willful" element. Br. in Opp. 6-7 n.1. But the facts about Respondents' state of mind have nothing to do with the "actual damages" issue, and Respondents do not assert that they do. *Id.* Further, the Court of Appeals has specifically instructed the District Court, on remand of the APA claims, *not* to consider Respondents' mental state of mind or whether they intentionally or willfully violated the law. Pet. App. 12a-13a ("Thus, whether the VA consciously decided to violate the law is not a necessary consideration in evaluating whether it did violate the law."). The "interlocutory" objection raised by Respondents is a red herring that should not delay review.

Moreover, it was Respondents, not Petitioners, that put the issue of "actual damages" at the forefront of this case. At the District Court, Respondents moved for summary judgment—not on the "intentional or willful" issue—but on the "actual damages" issue. C.A. R. 33 at 55-59. The District Court granted Respondents'

summary judgment motion as to the Veterans' Privacy Act claims on this basis and this basis alone. Pet. App. 19a-33a. Given Respondents' own choice in how to proceed in defense of this case, they should not now be heard to complain that Petitioners are somehow jumping the gun.

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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